UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
SALVATORE CANDELA,

                    Petitioner,

-against-

UNITED STATES OF AMERICA,

                    Respondent.
---X
DEARIE, District Judge.

MEMORANDUM & ORDER

95 CR 438

Petitioner, pro se, moves pursuant to Federal Rules of Civil Procedure 60(b) for relief

from this Court's judgment and for re-sentencing consistent with United States v. Booker, 543

U.S. 220 (2005). For the reasons set forth below, relief is denied.

Background

On August 2, 1996, petitioner was convicted by a jury of conspiracy, robbery and related

firearms offenses, possession of stolen goods, and numerous narcotics offenses. He was

sentenced to concurrent terms of 262 months in prison on the conspiracy, robbery, stolen goods,

firearms dealing, and narcotics counts. In addition, he was sentenced to consecutive terms of five

years, 20 years and 20 years for the robbery-related firearms offenses.

Petitioner appealed, claiming that there was insufficient evidence to support his

conviction for using a gun in connection with one of the robberies, that this Court erred in

determining that petitioner acted as an organizer or leader within the meaning of United States

Sentencing Guideline § 3B1.1, and that due process required the dismissal of the charges because

of the government's outrageous conduct during the investigation. On April 19, 2000, the Second

Circuit affirmed the conviction by summary order.

On March 15, 2001, petitioner timely filed a petition pursuant to 28 U.S.C. § 2255

seeking relief largely on the ground that he received ineffective assistance of trial counsel. In

addition, petitioner claimed that this Court erred in failing to conduct a hearing pursuant to

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) to explore an alleged conflict of interest of

trial counsel and claimed that Juror Number Six, a student at New York Law School, was

improperly empaneled. By motion dated February 3, 2003, petitioner sought to amend the

petition to include a claim of ineffective assistance of appellate counsel and made additional

claims that counsel was absent during the trial without his consent and that the substituted

counsel labored under a conflict of interest. By Memorandum and Order dated January 24, 2005,

this Court denied relief, dismissed the petition, and declined to issue a certificate of appealability.

Petitioner filed a notice of appeal. It appears that the appeal is presently pending in the Second

Circuit.

On December 8, 2005, petitioner filed the instant motion which he styled as a Rule 60(b)

application. The motion is in substance another petition for relief pursuant to 28 U.S.C. § 2255.

Cf. Gonzalez v. Crosby, 125 S.Ct. 2641 (2005) (Rule 60(b) motion raising claim for relief from

judgment of conviction based on change of law constitutes successive § 2254 petition).

However, because petitioner's appeal is pending, the instant application is not "second or

successive" within the meaning of § 2255. See Whab v. USA, 408 F.3d 116, 118 (2005).

Moreover, Second Circuit case law suggests that this Court is not required to treat the application

as a motion to amend. See Id. at 119 (where two petitions are not before the district court

simultaneously, the court need not be instructed to treat new petition as motion to amend initial

petition). Assuming this Court may consider the merits of the application, see Mumin v. United

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States, 2005 WL 2452545, *1 (S.D.N.Y. Oct. 5, 2005) (district court considered application

made after petitioner purported to file notice of appeal from order denying prior Section 2255),

the application is denied. Booker "does not apply to cases on collateral review where the

defendant's conviction was final as of January 12, 2005, the date that Booker issued." Guzman v.

United States, 404 F.3d 139, 144 (2005). In the alternative, in accordance with Gitten v. United

States, 311 F.3d 529, 534 (2d Cir. 2002), the claim is denied as beyond the scope of Rule 60(b).

SO ORDERED.

Dated: Brooklyn, New York
      May 11, 2006
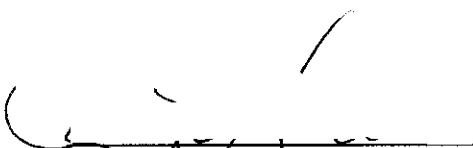
RAYMOND J. DEARIE
United States District Judge